(2)

No. 90-655

FILED

NOV 26 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

FREEPORT-MCMORAN INC., *et al.*,
*Petitioners,*

v.

K N ENERGY, INC.,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

## BRIEF IN OPPOSITION TO THE PETITION

---


ROBERT L. MORRIS
P. KATHLEEN LOWER
(Counsel of Record)
MORRIS & LOWER
7800 East Union Avenue
P.O. Box 37090
Denver, Colorado 80237-0090
(303) 779-4664

STEVE H. OZAWA
K N ENERGY, INC.
12055 West 2nd Place
P.O. Box 15265
Lakewood, Colorado 80215
(303) 989-1740



WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001


13

## QUESTIONS PRESENTED

1. Whether the addition as a party plaintiff of a limited partnership with new substantive claims divests a federal court of its diversity jurisdiction where the limited partners are not all diverse to the defendant.

2. Whether the court of appeals erred in declining to exercise its discretion to dismiss a non-diverse, dispensable party whose presence in the litigation "spoils" diversity jurisdiction.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 90-655

---

FREEPORT-MCMORAN INC., *et al.*,
*Petitioners,*

v.

K N ENERGY, INC.,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

## BRIEF IN OPPOSITION TO THE PETITION

---

Respondent K N Energy, Inc. ("K N") respectfully requests the Court to deny the petition for a writ of certiorari, originally filed on October 9, 1990, to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 10, 1990.[1]

---

[1] Pursuant to Rule 29.1 of the Rules of this Court, respondent K N states that it has no parent corporation and has only wholly-owned subsidiaries, none of which has any publicly-held securities.

## STATEMENT

This case presents yet another "species of the same generic problem" (*Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) concerning when a federal court has subject matter jurisdiction to decide state law claims between non-diverse parties. In this action, McMoRan Oil & Gas Company and Freeport-McMoRan Inc. (the "original plaintiffs"), as sellers under a natural gas purchase contract (the "Contract"), sued respondent K N for breach of contract on April 19, 1985. Pet. App. 2a. Both original plaintiffs were Delaware corporations with their principal places of business in Louisiana, and both were diverse to respondent K N, a Kansas corporation with its principal place of business in Colorado. *Id.*

Just a few days after filing the original complaint, McMoRan Oil & Gas Company transferred the Contract to FMP Operating Company ("FMPO"), a Texas limited partnership with limited partners who were Kansas or Colorado citizens and thus were not diverse to K N. Pet. App. 2a-3a. The original plaintiffs, however, did not seek to add FMPO as a party plaintiff until December 1987. *Id.* At that time, allegedly pursuant to Rules 15 and 25(c) of the Federal Rules of Civil Procedure, they moved to amend their complaint, contending that "[i]t ha[d] become necessary to add" FMPO as a party plaintiff because it was the owner of "the producing properties and the gas purchase contract that are the subject of this litigation" (Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(a)); they simultaneously moved to amend the complaint to add two new claims based on the Tenth Circuit's decision in *Martin Exploration & Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987), *rev'd*, 486 U.S. 204 (1988). In Counts Eight and Ten of their amended complaint, which they claimed "ar[o]se directly from the *Martin* decision" (Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(b)), FMPO and the original plaintiffs proceeded on the new theory that *Martin* permitted them to elect the "regulated" price, rather than the then-lower "deregulated" price, for gas sold under the Contract. *Id.*[2]



In January 1988, the district court granted the original plaintiffs' motion to add FMPO as a party plaintiff and to add the new counts. Pet. App. 3a. Before the case went to trial, respondent K N moved to dismiss the action for lack of subject matter jurisdiction. *Id.* It claimed that the addition of FMPO, which had limited partners who were not diverse to respondent K N, and the addition of the new claims divested the court of diversity jurisdiction. *Id.*

The district court denied respondent K N's motion to dismiss the case. Pet. App. 3a. While the district court stated the question as "whether the existence of that limited partner destroys diversity," it declined to dismiss the action because the question arose just weeks before trial; it concluded that "there is plenty of authority that at a late point like this, there is sufficient ancillary jurisdiction that the Court should proceed." *Id.* After trial, the district court entered judgment in part for petitioners and in part for respondent. *Id.*

Both parties appealed to the Tenth Circuit. Before the Tenth Circuit, K N raised and briefed both the jurisdic-

---

[2] The Tenth Circuit in *Martin* reviewed certain Federal Energy Regulatory Commission ("FERC") orders requiring producers of natural gas falling within both regulated and deregulated categories under the Natural Gas Policy Act ("NGPA")—so-called "dually qualified" gas—to price the gas as if it were in a deregulated category. The Tenth Circuit in *Martin*, however, disagreed with FERC's interpretation of the NGPA and held that the producer could elect to price its gas under the category, either the regulated or deregulated category, that generated the highest price. 813 F.2d at 1066-70. This decision, before the Supreme Court's reversal, was viewed by the original plaintiffs as "substantially chang[ing] the law applicable to this case." Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(b).

tional issue and the merits of the case. On July 10, 1990, the Tenth Circuit dismissed the action for lack of jurisdiction. Pet. App. 1a-8a. It first revisited the statutory basis for its jurisdiction and noted that 28 U.S.C. § 1332 (a) (1) "requires complete diversity of citizenship." Pet. App. 4a. It further noted that, "[f]or purposes of determining whether diversity jurisdiction is present [where a limited partnership is a party], the Court has held . . . that the citizenship of all of the members of the entity must be consulted." *Id.*, citing *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990). It then concluded that, while the "substitution" of a non-diverse party generally does not affect the court's existing diversity jurisdiction, the "addition" of FMPO as a non-diverse party plaintiff destroyed the court's jurisdiction; it rested this conclusion on the fact that FMPO, as the seller under the Contract, was the real party in interest in the litigation. Pet. App. 6a-7a. The court then held that the district court erred in exercising what the district court had characterized as "ancillary jurisdiction" over the case despite the absence of diversity. *Id.* at 7a-8a.

After the court of appeals dismissed the case for lack of subject matter jurisdiction, the original plaintiffs moved the court to dismiss FMPO as a dispensable, non-diverse party and to assume jurisdiction of the case. Pet. App. 12a. The basis for this motion was that, after the parties filed their briefs in the Tenth Circuit, but before oral argument, FMPO had transferred the Contract to a newly formed—and diverse—Delaware corporation, Freeport-McMoRan Oil & Gas Company. Pet. at 5.[3] The court of appeals declined to exercise its discretion to drop FMPO from the case. Pet. App. 12a.

---

[3] Freeport-McMoRan Oil & Gas Company has never been formally substituted for FMPO or added as a plaintiff in this case and, accordingly, is not properly before this Court as a petitioner.



## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW DOES NOT CONFLICT WITH EITHER THIS COURT'S DECISIONS HOLDING THAT POST-COMMENCEMENT EVENTS GENERALLY DO NOT OUST FEDERAL COURTS OF DIVERSITY JURISDICTION OR THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS

To create a conflict where no conflict exists, petitioners assert that (1) the decision below is contrary to this Court's decisions holding that events subsequent to the commencement of an action generally do not oust a court of diversity jurisdiction and (2) the decision of the Tenth Circuit somehow holds that the Court's recent decision in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), overruled *sub silentio* that long-standing principle. The opinion below, however, does nothing of the sort. It does not depart from either this Court's decision in *Carden* or the well-settled principles of federal diversity jurisdiction.

In *Carden*, this Court held that, in a suit involving a limited partnership, "the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S. Ct. at 1016. The court below did not hold, as petitioners suggest (Pet. at 7), that *Carden* overruled the principle that post-commencement events generally do not divest courts of diversity jurisdiction. Indeed, the Tenth Circuit did not even quarrel with that well-settled principle. *See* Pet. App. 6a. Rather, the court below correctly mandated dismissal of the plaintiffs' case because (1) the case fell within a well-established exception to that principle—i.e., that the addition of a non-diverse party who is the real party in interest and makes new substantive claims may require reconsideration of diversity jurisdiction (*see Grady v. Irvine*, 254 F.2d 224, 226 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958); *cf. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)); (2)

the district court should have reconsidered its diversity jurisdiction after the addition of FMPO as a party plaintiff and the filing of new claims; and (3) applying *Carden*'s rule that federal courts must examine the citizenship of all partners in determining whether complete diversity exists, the presence of non-diverse limited partners divested the court of subject matter jurisdiction. Pet. App. 6a-7a.[4]

There is nothing at all extraordinary about this decision. The Tenth Circuit recognized that, as a general matter, the mere substitution of a party under Rule 25(c), after the commencement of a case, does not require reassessment of diversity jurisdiction. Pet. App. 6a. But it also recognized that this is not such a case. *Id.* at 6a-7a.[5] This is a case in which the post-commencement addition of a non-diverse party warranted a jurisdictional reassessment because the added party asserted new claims and held the real stake in the controversy. *See id.*

The Tenth Circuit is not alone in that view. Other federal courts of appeals have held that the addition of a non-diverse party can divest courts of jurisdiction where the amendment "changes the nature of the right asserted and alters the substance of the action." *Grady v. Irvine*, 254 F.2d at 226 (post-commencement substitution of a

[4] Petitioners assert, in a footnote (Pet. at 8 n.5), that the court of appeals did not mention this exception to the general rule that post-commencement events do not oust courts of diversity jurisdiction. Petitioners, however, again misinterpret the decision below. The parties argued the applicability of the exception before the court of appeals (*see* Brief of Defendant-Appellant and Cross-Appellee K N Energy, Inc., at 9-11; Brief of Plaintiffs-Appellees and Cross-Appellants McMoRan Oil & Gas Company, et al., at 7-12), and the court's analysis demonstrates that it dismissed the action based on that exception (Pet. App. 6a-7a).

[5] The court below correctly concluded that petitioners did not "substitute" FMPO as the party plaintiff in this case, but "added" it as an additional party plaintiff who prosecuted the action with the original plaintiffs. Pet. App. 6a-7a.



nondiverse administrator as a party plaintiff and the corresponding amendment of claims divested the court of diversity jurisdiction); *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985) (addition of a non-diverse bankruptcy trustee as a party plaintiff with a statutory claim to void fraudulent transfer under the Bankruptcy Code divested the court of diversity jurisdiction); *see also* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3608, at 453-57 (1984).[6]

Petitioners provide no persuasive reasons for this Court to review the Tenth Circuit's application of that rule here. The decision below charts no new path. It conflicts with neither the decisions of this Court nor the decisions of any courts of appeals. It simply adheres to "the fundamental precept that federal courts are courts of limited jurisdiction" and that "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 374. There is no need for this Court to review that sound judgment here.[7]

[6] The mere fact that the district court had diversity jurisdiction at one time was no basis for its exercise of "ancillary jurisdiction" over the action, including the new claims, when the parties became non-diverse. As the court below correctly concluded, petitioners could not "be rescued by the doctrine of ancillary jurisdiction" (Pet. App. 7a), having chosen the federal forum (with its jurisdictional limitations) for their state law claims and having changed the nature of their action mid-course. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 370 (while plaintiff properly brought action against diverse defendant in federal court, court lacked diversity or ancillary jurisdiction to entertain plaintiff's new claim against a non-diverse third party defendant where the plaintiff had chosen the federal forum and where the claim was separate from her original claim). The court below thus declined, for sound reasons, to resort to the " 'elastic and ill-defined notions of ancillary jurisdiction—a concept not mentioned in Article III [of the Constitution]—to expand [its] jurisdiction.' " *Id.* (citation omitted).

[7] Because the decision below correctly applied well-settled principles of diversity jurisdiction, it is quite unlikely to spawn the

## II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *NEWMAN-GREEN* THAT COURTS OF APPEALS HAVE THE POWER TO DISMISS NONDIVERSE, DISPENSABLE JURISDICTIONAL "SPOILERS"

The decision below likewise is not in conflict with this Court's decision in *Newman-Green Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In *Newman-Green*, this Court held "that a court of appeals *may* grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jursdiction." *Id.* at 2220 (emphasis added). Nothing in *Newman-Green* suggests, however, that a court of appeals must exercise that power upon request; to the contrary, this Court emphasized that the federal courts should exercise this power to dismiss such non-diverse parties "sparingly." *Id.* at 2226. The Tenth Circuit's decision not to exercise that power here neither contravenes *Newman-Green* nor raises a significant question worthy of this Court's review.

---

"confusion, controversy and needless litigation" that petitioners and their amicus predict. Pet. at 8-9; *see also* Brief of the Fertilizer Institute as Amicus Curiae in Support of Petitioner, at 4-5, 10-11.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. MORRIS
P. KATHLEEN LOWER
(Counsel of Record)
MORRIS & LOWER
7800 East Union Avenue
P.O. Box 37090
Denver, Colorado 80237-0090
(303) 779-4664

STEVE H. OZAWA
K N ENERGY, INC.
12055 West 2nd Place
P.O. Box 15265
Lakewood, Colorado 80215
(303) 989-1740

November 1990